No. 14808

In the United States Court of Appeals for the Ninth Circuit

HELMS BAKERIES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

RESPONDENT'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

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PAUL P. O'BRIEN, CLER

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Helms Bakeries, petitioner
v.
Commissioner of Internal Revenue, respondent

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RESPONDENT'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

To the Honorable United States Court of Appeals for the Ninth Circuit and the Judges Thereof:

Comes now the Commissioner of Internal Revenue, the respondent in the above-entitled cause, by his attorneys, and presents this, his petition for a rehearing, with suggestion for a rehearing before the full Court, sitting *en banc,* in the above-entitled cause in which an opinion and judgment were rendered by this Court (by a panel consisting of Circuit Judges Orr and Chambers, and District Judge Jertberg) on August 14, 1956, and in support thereof respectfully presents the following reason:

That this Honorable Court, as demonstrated by its opinion (by District Judge Jertberg), in

deciding the present review, while properly declining to entertain the petition for review as to a question decided by the Tax Court under Section 722 (b) (2) of the Internal Revenue Code (1939) in appropriate observance of the prohibition against appellate review contained in Section 732 (c), has inconsistently and erroneously taken jurisdiction and reviewed the case as to a question decided under Section 722 (b) (4), and in so doing has violated the mandate of Section 732 (c) and ignored the prior holding of this Court (by a panel consisting of Circuit Judges Garrecht, Healy, and Bone) in the Waters case [1]; and that in the interests of justice this Court should therefore vacate and set aside its opinion and judgment and grant a rehearing *en banc,* so that the full Court may consider the matter.

In support hereof, the Commissioner respectfully shows the following:

1. By section 732 (c) of the 1939 Code, Congress unequivocally prohibited any appellate review of any decision of the Tax Court of any question determined "solely by reason of" Section 722—or by reason of any of the other so-called "abnormalities provisions" of the Second World War Excess Profits Tax Law.[2]

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[1] *James F. Waters, Inc.* v. *Commissioner*, 160 F. 2d 596, certiorari denied, 332 U. S. 767.

[2] In Section 732 (c), Congress stated:

> *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

In this case, the only issues presented to the Tax Court for decision and attempted to be brought to this Court on review related exclusively to the taxpayer's right to relief under Section 722, and those were, specifically, (1) whether the taxpayer's base period earnings were depressed by reason of a price war within the purview of Section 722 (b) (2), and (2) whether it had increased its capacity for production and operation within the purview of Section 722 (b) (4). The Tax Court, after a hearing on the merits, had decided both issues against the taxpayer, denying relief both under subsection (b) (2) and subsection (b) (4).

The Commissioner before this Court, on brief and at the oral argument, took the position that Section 732 (c) deprived the Court of jurisdiction to review the decision of the Tax Court that the taxpayer was not entitled to any relief under the provisions of subsection (b) (2) or subsection (b) (4).[3]

2. In deciding the case, the Court, by its opinion (by District Judge Jertberg), in observance of the prohibition of Section 732 (c) has declined to review the decision of the Tax Court on the issue under Section 722 (b) (2). On the issue under Section 722 (b) (4), however, the Court has in fact entertained the petition for review, *reviewed* the matter and "remanded to the Tax Court for further consideration of

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[3] The Commissioner conceded that this Court could review the further question presented here by the taxpayer as to whether it had been accorded a review by the Special Division of the Tax Court in keeping with Section 732 (d). The Court, in its opinion, has ruled on that matter, deciding it against the taxpayer, and we do not of course quarrel with that.

the relief sought by petitioner under Section 722 (b) (4)." (Op. 10.)

3. The action of the Court in *reviewing* as to the issue under Section 722 (b) (4) is plainly and inherently inconsistent with its action on the issue under Section 722 (b) (2).

On the issue under subsection (b) (2), the Court recognized, as indicated, the prohibition of Section 732 (c) against appellate review. However, on the issue under subsection (b) (4) the Court fell into error and *reviewed* the decision of the Tax Court—without even stating or attempting to demonstrate why it regarded the decision of the Tax Court as any more reviewable on the subsection (b) (4) issue than on the subsection (b) (2) issue.

An analysis of the opinion of the Court readily demonstrates, we believe, that what the Court has done on the issue under subsection (b) (4) is to *review* the decision of the Tax Court—in violation of Section 732 (c). Clearly, the examining of evidentiary findings of fact, the measuring of ultimate findings against the evidentiary findings, and the analyzing of ultimate findings and of the underlying reasoning relied upon in reaching a decision, constitute nothing more nor less than the exercise of the appellate function. What the Court has done on the subsection (b) (4) issue, in substance and in effect, is the equivalent of what an appellate court would do in the normal Tax Court case subject to appellate review—i. e., in the normal case which is subject to appellate review under the ordinary provisions of the law.

In other words, what the Court has done on the subsection (b) (4) issue is to apply the same tests to the decision of the Tax Court which an appellate court would usually apply in ordinary Tax Court cases which are not covered by the prohibition of Section 732 (c). In so doing, the Court has clearly exceeded the function left to it in Section 722 cases by the provisions of Section 732 (c), we submit. The function of the appellate court in a Section 722 case is, in our opinion, undeniably limited by Section 732 (c) to the ascertaining of whether the question as to which review is sought is one which was determined by the Tax Court "solely by reason of" Section 722. Once the appellate court has determined whether the particular issue is one decided by the Tax Court "solely by reason of" Section 722, its inquiry should come to an end, for clearly it has then fully exhausted its appropriate sphere of inquiry: It has then exhausted its appropriate function under the law. Here, once the Court ascertained that the question under subsection (b) (4) had been determined by the Tax Court "solely by reason of" Section 722—as indeed it had been, undeniably—it should have refrained from examining the matter further.

4. In reviewing the decision of the Tax Court as to the issue under Section 722 (b) (4), the Court, in addition to violating the mandate of Section 732 (c), has ignored the prior holding of the Court (by a panel consisting of Circuit Judges Garrecht, Healy, and Bone) in the case of *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596, certiorari denied, 332 U. S.

767—the first and now the leading case on the subject of the prohibition of appellate review in these so-called "abnormalities" questions under the excess profits tax law of World War II.

A proper observance and application by the Court in the instant case of the rule enunciated earlier in the *Waters* case, we submit, clearly would have required the Court to decline to entertain the petition for review as to the issue under subsection (b) (4), as it did with respect to the issue under subsection (b) (2). In other words, once it appeared that the decision of the Tax Court on the subsection (b) (4) issue had been "solely by reason of" Section 722, the Court—had it observed the rule of the *Waters* case—should have refrained from going further and analyzing the underlying grounds, reasons, or reasoning upon which the Tax Court has based its denial of relief under subsection (b) (4).

The situation before the Court in the instant case with respect to the review sought by the taxpayer on the issue under subsection (b) (4), or the issue under subsection (b) (2), was identical to that before the Court in the *Waters* case. In the *Waters* case, the Tax Court, following its holding in a prior case, had denied relief because of its reliance upon a provision of a regulation on the question of whether certain income could be considered as "abnormal" income attributable to other years within the provisions of Section 721. Before this Court, the taxpayer there had sought review, challenging the underlying reasoning of the Tax Court and the validity of the

regulation as interpreted by the Tax Court. This Court, however, followed and observed the provisions of Section 732 (c) and declined to review the matter, thus refraining from analyzing the underlying reasoning upon which the Tax Court had based its denial of relief, even though the taxpayer had contended that the denial of relief was due to the improper application of an invalid regulation—a question purely of law, and reviewable, it was claimed.

Clearly, in determining whether the matter comes within the prohibition against review contained in Section 732 (c), the underlying reasoning of the Tax Court is immaterial: The controlling factor, by which it must be determined whether the conclusion of the Tax Court is reviewable despite the prohibition of Section 732 (c), is whether the particular issue was decided by the Tax Court "solely by reason of" Section 722—or of one of the other "abnormalities" provisions. This, implicit in the decision of the Court in the earlier *Waters* case, was ignored by the Court in deciding the instant case.

5. Furthermore, the opinion of the Court, in reviewing and remanding to the Tax Court on the issue under Section 722 (b) (4), discloses that the Court has misconceived the fundamental plan of the statute granting relief under Section 722. The Congressional authority for the grant of any relief under Section 722 was conditioned narrowly upon the establishment by the taxpayer of two facts, as plainly set forth in subsection (a) of Section 722: First, the taxpayer must establish that its excess profits tax,

without or before the grant of relief, was "excessive and discriminatory," and second, the taxpayer must establish what would be "a fair and just amount representing normal earnings" to be used in computing its tax upon a "constructive" average base period net income under the law. Further, in subsection (b), Section 722, furnishing its own definition of the term "excessive and discriminatory" tax, enumerated the various situations which Congress felt should be considered as resulting in an "excessive and discriminatory" tax—one of the situations, under subsection (b) (4), being the case of a change in the character of the business during the base period.

Therefore, under the statute, one of the *conditions precedent* to the allowance of any relief under Section 722 is that the taxpayer established that its tax was "excessive and discriminatory." In the instant case, the Tax Court expressly found as a fact (last paragraph of the findings, R. 53) that the "excess profits tax paid by petitioner for the years in issue was not excessive and discriminatory." That finding in and of itself *precluded* the allowance of any relief to the taxpayer under subsection (b) (4)—or under any of the other provisions of subsection (b). Clearly, therefore, after the Tax Court made that finding, if it had said nothing more,[4] but had simply proceeded

[4] Actually, the Tax Court in this case did go on to discuss the matter and to state, as its final conclusion (last paragraph of its discussion on the Section 722 (b) (4) issue, R. 57):

> We think it is clear that whatever changes took place with respect to petitioner's capacity for production and operation those changes did not bear the proper relationship

to deny relief under subsection (b) (4), its action unquestionably would not be disturbed on review. The fact that the Tax Court (in its separate "opinion", R. 54–57) may have gone beyond that, to explain further, and may have given an inartistic statement of its reasoning—or one not as complete, or as exact, or as desirable as might perhaps have been written—is wholly immaterial for present purposes. The finding by the Tax Court (R. 53) that the tax paid by the taxpayer was not "excessive and discriminatory" in and of itself *sufficed* to dispose of the entire case before the Tax Court, as to the issue under subsection (b) (4) as well as the issue under subsection (b) (2).

6. The Commissioner believes that the matter presented herein is one of extraordinary importance, warranting review by this Court *en banc,* and he believes that review *en banc* is also necessary in order to resolve the conflict with the earlier decision of the Court (by a different panel) in the *Waters* case.

Wherefore, in view of the foregoing, the Commissioner respectfully requests that this, his petition for rehearing, be granted by this Honorable Court, and that the opinion and judgment entered in this cause on August 14, 1956, be vacated and set aside and that a rehearing be granted, and, further, the Commis-

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to its increased earnings to warrant the granting of the relief otherwise authorized by section 722 (b) (4).

That, clearly, was the equivalent of a statement by the Tax Court that it had concluded under the facts that the grant of relief under Section 722 (b) (4) was not warranted.

sioner respectfully suggests that a rehearing *en banc* be granted.

Respectfully submitted.

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SEPTEMBER 1956.

CERTIFICATE OF COUNSEL

The undersigned, attorneys for the Commissioner of Internal Revenue, respondent herein, hereby certify that the foregoing petition is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

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